

**BOIES SCHILLER FLEXNER LLP**

David Boies (admitted pro hac vice)

333 Main Street

Armonk, NY 10504

Tel: (914) 749-8200

dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165

Beko Reblitz-Richardson, CA Bar No.  
238027

Erika Nyborg-Burch, CA Bar No. 342125

44 Montgomery St., 41st Floor

San Francisco, CA 94104

Tel.: (415) 293-6800

mmao@bsfllp.com

brichardson@bsfllp.com

enyborg-burch@bsfllp.com

James Lee (admitted pro hac vice)

Rossana Baeza (admitted pro hac vice)

100 SE 2nd St., 28th Floor

Miami, FL 33131

Tel.: (305) 539-8400

jlee@bsfllp.com

rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334

725 S Figueroa St., 31st Floor

Los Angeles, CA 90017

Tel.: (213) 995-5720

alanderson@bsfllp.com

**SUSMAN GODFREY L.L.P.**

Bill Carmody (admitted pro hac vice)

Shawn J. Rabin (admitted pro hac vice)

Steven M. Shepard (admitted pro hac vice)

Alexander Frawley (admitted pro hac vice)

1301 Avenue of the Americas, 32nd Floor

New York, NY 10019

Tel.: (212) 336-8330

bcarmody@susmangodfrey.com

srabin@susmangodfrey.com

sshepard@susmangodfrey.com

afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891

1900 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

Tel.: (310) 789-3100

abonn@susmangodfrey.com

**MORGAN & MORGAN**

John A. Yanchunis (admitted pro hac vice)

Ryan J. McGee (admitted pro hac vice)

201 N. Franklin Street, 7th Floor

Tampa, FL 33602

Tel.: (813) 223-5505

jyanchunis@forthepeople.com

rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805

711 Van Ness Ave, Suite 500

San Francisco, CA 94102

Tel: (415) 358-6913

mram@forthepeople.com

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER  
CASTILLO, and MONIQUE TRUJILLO  
individually and on behalf of all other similarly  
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION TO STRIKE PORTIONS  
OF GOOGLE'S SUMMARY JUDGMENT  
REPLY (DKT. 934)**

Judge: Hon. Yvonne Gonzalez Rogers

Hearing Date: June 6, 2023

Time: 1:00 p.m.

Location: Courtroom 1 – 4th Floor

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**ISSUE PRESENTED**

Whether this Court should strike (1) a new argument that Google raised for the first time in its reply brief in support of its motion for summary judgment, and (2) expert declarations cited in Google’s reply which (A) were not cited in Google’s opening brief, (B), were never subject to cross examination, and (C) where Google promised not to rely on this material for any purpose apart from the sanctions proceedings?

Plaintiffs respectfully request that the Court strike (1) Google’s technical-circumvention argument relating to Plaintiffs’ CDAFA claim (Dkt. 934 at 13), and (2) Exhibits 146 and 147 to the Supplemental Broome Declaration (Dkts. 933-4, 933-5).

BOIES SCHILLER FLEXNER LLP

Mark C. Mao (CA Bar No. 236165)  
mmao@bsfllp.com

Plaintiffs' Motion to Strike Portions of Google's MSJ Reply  
Case No.: 4:20-cv-03664-YGR-SVK

1 **I. INTRODUCTION**

2 Unhappy with its arguments and evidence, Google resorts to desperate and improper  
3 tactics. *First*, Google on Reply raises a brand-new argument about Plaintiffs' CDAFA claim.  
4 *Second*, Google relies on two expert declarations prepared exclusively for the sanctions  
5 proceedings in this case, which were never subject to discovery (and were instead disclosed more  
6 than six months after the discovery cut-off), and which address material Google promised not to  
7 rely on for any other purpose. The Court has already sanctioned Google (twice) for concealing  
8 logs and data sources, and it improper for Google to rely on these materials.

9 **A. Google's New CDAFA Argument Should Be Stricken.**

10 Google's opening summary judgment brief included two arguments for the CDAFA  
11 claim, which Google summarized as follows: "(1) Google did not 'access' Plaintiffs' computers,  
12 and (2) Plaintiffs have not suffered 'damages or loss.'" Dkt. 907-3 at 22. Google's reply brief  
13 adds a third argument, which Google concedes is a "separate[]" argument: "*Separately*, CDAFA  
14 requires that the defendant circumvent[] technical or code-based barriers, or otherwise render  
15 ineffective any barriers . . . to prevent access." Dkt. 934 at 13 (emphasis added).

16 This new argument should be stricken. "[Google] could have and should have asserted  
17 this argument in its opening motion. Because [Google] waited and asserted this argument . . . for  
18 the first time in its reply brief, the Court [should] strike[] it." *Groupion, LLC v. Groupon, Inc.*,  
19 2012 WL 3025711, at \*3 n.3 (N.D. Cal. July 24, 2012) (striking arguments "asserted for the first  
20 time in [the] reply brief"). Google did not even preview this argument during the February 14,  
21 2023 Case Management Conference where the Court walked through Google's proposed bases  
22 for summary judgment, and the Court thereafter waived its usual pre-filing letter requirements.  
23 Feb. 14, 2023 Hrg. Tr. 30:2-9.

24 Alternatively, this Court should ignore Google's new argument. "[P]arties 'cannot raise  
25 a new issue for the first time in their reply briefs.'" *Taymuree v. Nat'l Collegiate Student Loan*  
26 *Tr.* 2007-2, 2017 WL 952962, at \*2 n.2 (N.D. Cal. Mar. 13, 2017) (Gonzalez Rogers, J.) (quoting

1 *State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990)). It would be “improper for the  
2 Court to consider” Google’s new CDAFA argument because it was “raised for the first time on  
3 reply.” *Id.*

4 If the Court is inclined to consider Google’s new argument, it should grant Plaintiffs leave  
5 to file their proposed sur-reply—attached as Exhibit A to the McGee Declaration accompanying  
6 this Motion. “When a party raises a new argument or presents new evidence in a reply brief, a  
7 court may consider these matters only if the adverse party is given an opportunity to respond.”  
8 *In re PersonalWeb Techs., LLC*, 2019 WL 1975432, at \*1 (N.D. Cal. Feb. 6, 2019) (granting  
9 motion for leave to file sur-reply).

10 **B. Google’s Sanctions-Only Evidence Should Be Stricken.**

11 This Court should also strike two exhibits that Google cited for the first time in its Reply  
12 Statement of Facts: Broome Supplemental Exhibits 146 and 147. Dkt. 933-3 at 30 (PAF 4); Dkts.  
13 933-4, 933-5. Exhibit 146 is the November 30, 2022 declaration of Google expert Konstantinos  
14 Psounis. Exhibit 147 is Dr. Psounis’s February 10, 2023 declaration. Google prepared these  
15 declarations for its response to the Court’s October 27, 2022 Order to Show Cause, where Google  
16 was ordered to “show cause as to why the Court should not find that . . . Google should be  
17 sanctioned.” Dkt. 784; *see also* Dkts. 797, 857 (Google’s Responses to the OSC).

18 These exhibits discuss source code that Google produced exclusively for the sanctions  
19 proceedings, and long after the close of discovery. The code is from a Google log that stores  
20 private browsing data alongside regular browsing data. Google did not disclose this log until June  
21 2022—after the close of fact discovery, after expert reports were served, and after the Court  
22 sanctioned Google (the first time). *See* Dkt. 898 (March 2023 Sanctions Order) at 4-5, 7  
23 (discussing this “newly-disclosed” log, and finding that it “includes both authenticated and non-  
24 authenticated records,” and sanctioning Google (a second time) for concealing this log and other  
25 logs). Dr Psounis was not deposed or subjected to any scrutiny on these declarations; Google in  
26 fact did not present him at the March 2, 2023 sanctions hearing.

1 Exhibits 146 and 147 should be stricken because Google promised not to rely on the  
2 source code except for purposes of responding to the Order to Show Cause. During an October  
3 2022 hearing, the Court advised the parties that the sanctions proceedings should not be used to  
4 “reopen discovery.” Oct. 27, 2022 Hrg. Tr. 12:4–6. Consistent with that guidance, Plaintiffs  
5 sought and obtained Google’s agreement not to use this source code for any other purpose.

6 I understand that we agree that Google’s production of source code files is within  
7 the scope of responding to the Court’s Order to Show Cause, and that Plaintiffs  
8 do not intend to rely on that code for purposes other than the OSC. ***Google***  
9 ***likewise does not intend to rely on source code for purposes other than the OSC.***  
10 To the extent Plaintiffs later put the [] log at issue and claim it joins authenticated  
11 and unauthenticated data, Google reserves the right to rely on the code on which  
12 it has already relied in the course of responding to the OSC.

13 McGee Decl. Ex. B (emphasis added).

14 Google’s reliance on Exhibits 146 and 147 reneges on that agreement. While Plaintiffs’  
15 summary judgment opposition did cite this log (Dkt. 924-3 at 15; *see also* Dkt. 933-3 (PAF 4)),  
16 Plaintiffs did not make any arguments or submit any evidence about the source code.  
17 Consequently, Google should not be allowed to rely on Broome Exhibits 146 and 147 at summary  
18 judgment and trial.

19 Plaintiffs have been prejudiced. While their consultant was able to review the same source  
20 code, Plaintiffs’ testifying expert, Jonathan Hochman, was deprived of the opportunity to serve  
21 a supplemental report addressing this log, as well as other material that Google was sanctioned  
22 for concealing. Relatedly, Plaintiffs have not had any opportunity to question Dr. Psounis (or any  
23 Google employee) about this log. Google should now be held responsible for its strategic  
24 decisions to forestall Plaintiffs’ efforts to conduct meaningful discovery.

25 Alternatively, the Court should refuse to consider these exhibits because Google did not  
26 cite them in its opening brief. “[P]resenting new information in a reply is improper and deprives  
27 the opposing party of an opportunity to respond.” *Ramirez v. Bank of Am., N.A.*, 2022 WL  
28 17482039, at \*7 (N.D. Cal. Oct. 7, 2022) (Gonzalez Rogers, J.) (citing *Tovar v. U.S. Postal Serv.*,

3 F.3d 1271, 1273 n. 2 (9th Cir. 1993)). This Court should “decline[] to address” Google’s arguments about these exhibits, “which should have been raised in defendant’s motion but were raised for the first time in defendant’s Reply.” *Id.* Google’s opening brief included arguments about whether private browsing data is “unidentified.” Dkt. 907-3 at 23; Dkt. 933-3 (SUF 56, 64). Google did not cite Exhibits 146 and 147 in support of those arguments, thus depriving Plaintiffs of an opportunity to address them.

In any event, Exhibits 146 and 147 only underscore why summary judgment is improper. Although Plaintiffs are not required to prove that private browsing data is identifying (Dkt. 924-3 at 3, 22), these exhibits at most demonstrate there is a triable issue of fact on that question. Plaintiffs have identified evidence that “private browsing data is identifying,” relying on Google employee admissions and expert data analysis. Dkt. 933-3 (PAF 24-25). If legally relevant, the jury can weigh the parties’ competing evidence to decide whether the data is identifying, guided by the Sanctions Orders’ jury instruction: “*The jury may infer from Google’s failure to disclose these data sources that they are not helpful to Google.*” Dkt. 898 at 12-13 (emphasis added). Against that backdrop, a jury could easily find that the data is identifying, particularly where Google employees admit that “we would never sa[y] that Google doesn’t know who you are while you’re Incognito.” Dkt. 933-3 (PAF 24).

## II. CONCLUSION

Plaintiffs respectfully request that the Court strike (1) Google’s technical-circumvention argument relating to Plaintiffs’ CDAFA claim, raised for the first time in Google’s summary judgment reply (Dkt. 934 at 13), and (2) Exhibits 146 and 147 to the Supplemental Broome Declaration (Dkts. 933-4, 933-5), which contains material Google promised not to rely on except for purposes of the sanctions proceedings in this case.

Dated: April 28, 2023

BOIES SCHILLER FLEXNER LLP

By /s/ Mark Mao

1 Mark C. Mao (CA Bar No. 236165)  
mmao@bsfllp.com

2 Beko Reblitz-Richardson (CA Bar No. 238027)  
3 brichardson@bsfllp.com  
4 Erika Nyborg-Burch (CA Bar No. 342125)  
5 enyborg-burch@bsfllp.com  
6 BOIES SCHILLER FLEXNER LLP  
7 44 Montgomery Street, 41<sup>st</sup> Floor  
8 San Francisco, CA 94104  
9 Telephone: (415) 293 6858  
10 Facsimile (415) 999 9695

11 David Boies (admitted pro hac vice)  
12 dboies@bsfllp.com  
13 BOIES SCHILLER FLEXNER LLP  
14 333 Main Street  
15 Armonk, NY 10504  
16 Telephone: (914) 749-8200  
17 Facsimile: (914) 749-8300

18 James W. Lee (*pro hac vice*)  
19 jlee@bsfllp.com  
20 Rossana Baeza (*pro hac vice*)  
21 rbaeza@bsfllp.com  
22 BOIES SCHILLER FLEXNER LLP  
23 100 SE 2<sup>nd</sup> Street, Suite 2800  
24 Miami, FL 33130  
25 Telephone: (305) 539-8400  
26 Facsimile: (305) 539-1304

27 Amanda Bonn (CA Bar No. 270891)  
28 SUSMAN GODFREY L.L.P.  
1900 Avenue of the Stars, Suite 1400  
Los Angeles, CA 90067  
Telephone: (310) 789-3100

Bill Carmody (*pro hac vice*)  
bcarmody@susmangodfrey.com  
Shawn J. Rabin (*pro hac vice*)  
srabin@susmangodfrey.com  
Steven Shepard (*pro hac vice*)  
sshepard@susmangodfrey.com  
Alexander P. Frawley (*pro hac vice*)  
afrawley@susmangodfrey.com  
SUSMAN GODFREY L.L.P.  
1301 Avenue of the Americas, 32<sup>nd</sup> Floor  
New York, NY 10019

1 Telephone: (212) 336-8330

2 John A. Yanchunis (*pro hac vice*)

3 jyanchunis@forthepeople.com

4 Ryan J. McGee (*pro hac vice*)

5 rmcgee@forthepeople.com

6 MORGAN & MORGAN, P.A.

7 201 N Franklin Street, 7th Floor

8 Tampa, FL 33602

9 Telephone: (813) 223-5505

10 Facsimile: (813) 222-4736

11 Michael F. Ram, CA Bar No. 104805

12 MORGAN & MORGAN

13 711 Van Ness Ave, Suite 500

14 San Francisco, CA 94102

15 Tel: (415) 358-6913

16 mram@forthepeople.com

17 *Attorneys for Plaintiffs*